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Supreme Court of the United States

OCTOBER TERM, 1954

No. 379

EARL WEBB, as President of SIGMA TAU GAMMA, an unincorporated Association, and all others similarly situated, and DELTA KAPPA, INC., *et al.*, and ROGER MUELLER, as Intervenors,

Plaintiffs-Appellants,

vs.

STATE UNIVERSITY OF NEW YORK, William S. Carlson, President, Charles Carside, *et al.*, comprising the Trustees of State University of New York,

Defendants-Appellees.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

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MAY IT PLEASE THE COURT:

Now come the appellees in the above entitled cause, by their counsel of record, and move that the appeal herein be dismissed, or that the order and judgment appealed from be affirmed.

Statement of the Case

This appeal is from a judgment entered upon the decision of a three judge court, convened pursuant to Section 2281 of the Judicial Code for the Northern District of New York, which judgment, after trial, dismissed the action.

The action was originally brought by an unincorporated association which avers that it is a "social fraternity" having chapters at colleges throughout the United States including several colleges of the defendant State University of New York. The latter is a corporate instrumentality of the State charged with responsibility for the "planning, supervision and administration of facilities, and provisions for higher education supported in whole or in part with state moneys". Its basic purpose is to provide for "a comprehensive and adequate program of higher education" (Education Law §§ 351, 352).

The plaintiffs sought an injunction on grounds of alleged unconstitutionality against enforcement of a regulation of the State University adopted by its governing Board of Trustees as follows:

> "RESOLVED that no social organization shall be permitted in any state-operated unit of the State University which has any direct or indirect affiliation or connection with any national or other organization outside the particular unit; and be it further
>
> "RESOLVED that no social organization, in policy or practice, shall operate under any rule which bars students on account of race, color, religion, creed, national origin or other artificial criteria; and be it further
>
> "RESOLVED that the President be, and hereby is, authorized to take such steps as he may deem appropriate to implement this policy, including the determination of which student organizations are social as distinguished from scholastic or religious, and his decision shall be final."

The complaint attacks neither the validity of nor the authorization for the second paragraph of the resolution. It is not suggested that there is any constitutional compulsion on a State University to approve and accept such organizations at its colleges (Cf. Education Law § 313). Nor is

any real controversy presented by contentions aimed at the third paragraph. The appellant organizations allege that they are "social" and no claimed right to be otherwise classified is in any way involved.

The attack centers on the related first paragraph of the resolution by which the Trustees, in whom is vested full power to regulate all matters pertaining to the operation and administration of state-operated institutions in the State University (Education Law § 355), have barred social organizations of students having affiliations outside the institution and thus subject to direction and control beyond the supervision of the educational authorities responsible for an adequate program of higher education furnished by the State. The claims of unconstitutionality are broadly formulated as denial of civil rights, of free speech, assembly and religion, under the First Amendment of the United States Constitution (presumably as made applicable to the State by the Fourteenth) and deprivation of due process and equal protection under the Fourteenth Amendment itself. Part of the due process objection is based on lack of notice and hearing before promulgation of this clearly legislative regulation, even though it was expressly conceded on argument and in the briefs before Judge Foley as a single District Judge on the original motions to dismiss, that no objection whatever could have been made "had the legislature passed a similar act." (See *Bowles* v. *Willingham*, 321 U. S. 503; *Bi-Metallic Invest. Co.* v. *State Board of Equal.*, 239 U. S. 441, 445; *Willapoint Oyster Co.* v. *Ewing*, 174 F. (2d) 676, 694, cert. den. 338 U. S. 860). Incidental claims of interference with vaguely specified relations between the fraternity and its members, and others, are also made.

The complaint was amended several times and eight intervenors were permitted to come in. Seven were other

national fraternities and sororities, both corporate and unincorporated. Only one is an individual student at a State University institution, apparently brought in in an effort to have a plaintiff with standing to raise civil rights questions.

The defendants urged that only a three judge court could grant the relief sought on the grounds claimed but addressed motions to dismiss to the single District Judge on the ground that the constitutional questions were so wholly unsubstantial that he had power to dismiss the complaint. Judge Foley convened a court of three judges and reserved decision on the motions until the trial before it. His opinion, annexed to the appellants' jurisdictional statement, indicates that he was impelled to do so largely because in some of the cases urged as controlling by the defendants, and held to be so by the three judge court, this Court had affirmed on motion judgments of dismissal rendered by courts of three judges without question of jurisdiction.

The three judge court heard the proof of the parties and at the close of the trial dismissed the action on the ground that prior decisions were clearly controlling on the facts and the issues raised. That court's opinion is likewise annexed to the jurisdictional statement.

Review of the judgment of a three judge court denying an injunction may be had on direct appeal to this Court in any case required to be heard and determined by such a court (28 U. S. C. §1253). The court below held that the merits of the constitutional questions sought to be raised by appellants were decisively settled by prior decisions of this Court. We submit that the decision was so clearly right as to leave no further substantial questions.

ARGUMENT

The questions sought to be raised are so manifestly unsubstantial in the light of controlling decisions as to warrant no further argument.

The testimony at the trial of the defendant Carlson, President of the State University of New York, shows that social organizations among students at institutions of higher learning have long been an educational problem of concern to those responsible for the proper functioning of such institutions. It shows also that restrictions upon or prohibitions against national fraternities and sororities are an established policy at many universities. The immediate cause of concern to the State University was specific instances of racial and religious discrimination by such organizations, concededly inadmissible at State operated and supported institutions. This brought the whole problem to the fore and it was carefully investigated and considered before adoption of the measure involved.

The testimony offered by defendants was generally directed at showing that their own organizations professed high standards and had no discriminatory requirements. It also bore on the relationship between the national organizations and their local chapters and members. These things were referred to by the Court in its opinion. Nothing was found to deprive the defendants, in the exercise of their clearly granted powers, of authority to decide that "social organizations, other than strictly autonomous ones subject without question to local control by the University, are detrimental to the educational environment at units of the State University." No rights were found violated by a regulation based on such a decision so as to result in any

constitutional compulsion on the defendant University to permit such organizations at its colleges.

The regulation does not constitute a general police prohibition against social organizations. It affects no one except in his capacity as a student at a State University unit and concerns itself with organizations which have their existence only in connection with those attending upon such colleges. Long ago the basic authority to adopt such measures was settled in *Waugh* v. *Board of Trustees of University of Mississippi*, 237 U. S. 589. There, the complainant sought to enjoin enforcement of a Mississippi statute, which expressly abolished certain named Greek letter fraternities and all other secret societies and prohibited them from existing in the University of Mississippi, a State educational institution. It was provided that any student who is a member of any of the prohibited societies could not compete for or receive class honors or diplomas or compete for any prize or medal, but it was further provided that such restrictions would not apply to any member of the prohibited societies if he filed an agreement upon entering any of the schools that he would not, during his attendance, "affiliate with same, nor attend their meetings, nor in any wise contribute any dues or donations to them". The complainant had been a member of one of the societies at another college and, upon applying for admission to the University of Mississippi, refused to sign pledges designed to carry the statutory restrictions into effect. Upon being refused admission, he brought action in the State courts, specifically alleging that he was deprived of his property and property rights and of his liberty, in violation of the Fourteenth Amendment. In its decision upon the appeal thereto, this Court commented that counsel had built

"elaborate and somewhat fervid arguments" upon the several elements of their claims of invalidity. It disposed of them clearly and completely as follows:

> "It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the State of Mississippi to determine. It is to be remembered that the University was established by the State and is under the control of the State, and the enactment of the statute may have been induced by the opinion that membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions. It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity. Nor can we accommodate the regulations to the assertion of a special purpose by the applying student, varying perhaps with each one and dependent alone upon his promise.
>
> "This being our view of the power of the legislature, we do not enter upon a consideration of the elements of complainant's contention. It is very trite to say that the right to pursue happiness and exercise rights and liberty are subject in some degree to the limitations of the law, and the condition upon which the State of Mississippi offers the complainant free instruction in its University, that while a student there he renounce affiliation with a society which the State considers inimical to discipline, finds no prohibition in the Fourteenth Amendment." (pp. 596, 597).

In *Hughes* v. *Caddo Parish School Board*, 57 F. Supp. 508, aff'd, 323 U. S. 685, complaint was made of a Louisiana act authorizing school boards to abolish high school fraternities and sororities, and of the act of the defendant Board in so abolishing such organizations and making it the duty

of superintendents to suspend or expel students "who might be or remain" members thereof. A motion to dismiss the action for want of a substantial Federal question was made, although invasion of personal liberties under the Fourteenth Amendment was alleged in terms. The motion was heard by a three-judge court in the first instance and granted on the authority of the *Waugh* case. On the same authority, this Court affirmed the judgment of dismissal on motion.

These cases settle beyond possibility of now raising any substantial controversy that it is within the power of educational authorities to adopt such disciplinary measures for governing the institutions under their control without invading constitutional rights of students. There is clearly no greater right in the organizations themselves to compel their recognition by educational authorities and to insist that they be permitted to operate at their institutions.

Hamilton v. *Regents*, 293 U. S. 245 must also be considered. In that case, students at the University of California asked to be exempted from the requirement of the Regents, in accordance with the organic law governing the University, that students take prescribed courses in military science and tactics in the Reserve Officers Training Corps. The ground upon which exemption was claimed was their religious and conscientious objection to war and military training. The Regents, who, like defendants, constituted a corporation for administration of the State University, refused to exempt them or make such training optional.

Upon refusal of the State courts to compel the Regents to accept them as students without taking the prescribed courses, an appeal was taken to this Court with respect to

their claim that the action of the State under its statutes and regulations deprived them of their liberty, guaranteed by the Fourteenth Amendment. It was held that their assertion of a right under the Fourteenth Amendment to be students at the State University, free from obligation to take one of the courses prescribed as a condition of attendance, was completely untenable.

The Court significantly noted that the students were not compelled by the State to attend the University. They were seeking education offered by the State and, at the same time, seeking to compel the State to relieve them of prescribed conditions of attendance. The State granted the privilege of college education at its own institutions and the liberty of conscience, safeguarded by the due process clause of the Fourteenth Amendment, conferred no right to such an education freed from its obligations. The appellants were free to think and believe as they pleased, but their beliefs did not empower them to dispense with prescribed requirements of the University if they chose to attend it.

The *Hamilton* case illustrates that even such personal liberties, safeguarded by the Fourteenth Amendment, as freedom of conscience cannot be turned into a compulsion upon state-operated institutions of higher learning to abdicate their functions of governing their curricula and the discipline and conduct of those who elect to attend them.

Finally, *Pyeatte* v. *Board of Trustees of University of Oklahoma*, 102 F. Supp. 407, aff'd, 342 U. S. 936, completely settles that a State University is not deprived of its power to manage its own institutions by the incidental effect of its regulations upon relationships theretofore existing between students and others. There it was held that the pro-

prietor of private rooming quarters, theretofore used by students, had no constitutional complaint because of a University requirement that all students sleep in college dormitories. The State University is clearly not compelled to maintain conditions under which private social organizations can continue to exist thereat.

The heavy weight of these authorities in their direct application to the facts and contentions here present seem to us to deprive the issues tendered by the appeal of any substance warranting further review. We respectfully submit that the judgment below should be affirmed.

Dated: July 16, 1954.

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